

Guidance on Protection of Workers Utilizing DOE Leased Facilities

I. Purpose

The Department of Energy (DOE) has determined that leasing of its facilities by commercial firms can support many program goals including: (1) accelerating clean-up; (2) reusing facilities; (3) transitioning the work force; and (4) partnering with local communities and industry in an overall effort to reduce Departmental risks and costs of clean-up. The purpose of this guidance is to identify responsibilities for ensuring protection of workers that use leased facilities. In addition, this guidance will establish levels of protection necessary to ensure worker safety by grading the risks associated with leasing DOE facilities.

II. Background

The DOE started many initiatives at the end of the Cold War in order to address budget reductions, continued clean-up goals, site specific legacy hazards and the increasing risks associated with these challenges. Leasing initiatives at several of the Departmental field organizations, including Pinellas, Mound, Savannah River and Oak Ridge identified issues requiring innovative approaches and solutions. The Headquarters Office of ES&H (EH) conducted several reviews of Field activities and raised concerns about the lack of overall guidance regarding safety and health issues at leased activities. Many crosscutting issues must be addressed while we provide for the protection of workers. Some of these include: worker safety and health, community trust, promotion of regional and local economic stability, clean-up goals, risk reduction, and asset reuse.

III. Scope

In order to address the myriad regulatory requirements, Departmental commitments, stakeholder concerns and program goals, each Departmental Field Organization, in consultation with the Lead Program Secretarial Officer (LPSO), will develop evaluation criteria, resulting in leasing conditions that provide protection to workers at leased facilities from both radiological and non-radiological hazards. In addition, facilities being leased will be graded by hazard to worker safety and health in order to determine the appropriate level of protection. Prior to leasing a facility for private use, each Field or Operations Office Manager will be required to make a finding that the facility is suitable for reuse and that worker safety and health will be protected. As a matter of policy,

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a facility is suitable for reuse if exposures to the maximally exposed¹ lessee employees from all DOE sources could reasonably be expected to be less than 25 mrem/year. This recommendation is based on the guidance for implementation of DOE 5400.5 that releases of property be consistent with the ALARA process and that exposures to the public be limited to one quarter or less of the maximum (which is 100 mrem annually). The clean-up of a facility by a lessee or a sub-lessee in order to make the facility suitable for reuse for a commercial activity is considered an activity for DOE and DOE shall regulate the activity.

IV. **Guidance**

A. **Leasing Authority**

The Department enjoys broad authorities independent of the authorities and procedures specified in other laws applied generally to Executive Agencies. The following section provides guidance on the use and limitations of these authorities.

Section 161 (g) of the Atomic Energy Act (AEA) of 1954 (42 USC 2201-2297g-4.) may be used for leasing if the property to be leased was acquired by DOE in connection with carrying out functions under the AEA. The AEA does not limit the length of leases. Generally, leases over 40 years are discouraged unless extenuating circumstances, including local practices, dictate otherwise.²

Section 3154 of the National Defense Authorization Act for Fiscal Year 1994 (also known as the "Hall Amendment") amending section 646 of the Department of Energy Organization Act (42 USC 7256), requires the Department to consult with the Environmental Protection Agency (EPA) or the appropriate state authority to assure that leasing of assets for reuse was appropriate from an environmental, health and safety perspective. Concurrence by EPA or the state is required if the facility is listed on the National Priorities List. Consultation and concurrence by EPA is required

¹ Maximally exposed individual: An individual whose location and habits tend to maximize his or her radiation dose from a particular source, resulting in a dose higher than that received by other individuals in the general population. Taken from NCRP Report No. 93, Ionizing Radiation Exposure of the Population of the States, September 1, 1987. (National Council on Radiation Protection and Measurements)

² Acting General Counsel memorandum, dated March 27, 1998, to Chief Counsel, Oak Ridge Operations Office regarding the leasing of Department of Energy property.

only when the Hall Amendment is used or when the primary purpose of the leasing action is for economic development.

The General Services Administration (GSA) has promulgated regulations under the Federal Property and Administrative Services Act (40 USC 471 et. seq.) that establish the conditions for leasing excess³ property to the private sector. Such leases are generally limited to one-year terms.

Section 649 of the DOE Organization Act authorizes the Department to lease temporarily not needed facilities for up to five years if leasing is in the public interest. Additional five-year periods may be granted.

The above-cited authorities are administered at the Field Office level by the Department's Certified Realty Specialists. Those individuals determine the use, requirements and limitations of those authorities, and they must review and approve all real estate transactions.

B. Safety Management/Safety Evaluation

It is essential that sufficient information about the facility's condition be available so that hazard judgments can be made to protect worker safety and health. The need to clean-up or de-contaminate a facility does not preclude its reuse, so long as a hazard analysis has been conducted to assess worker safety and a decision has been made that an adequate level of protection will be afforded the workers at the leased facility. In fact, some leases may provide for a lessee or sub-lessee to undertake clean-up activities prior to the commencement of commercial activities at a leased facility. These clean-up actions will be regulated the same as other DOE activities.

The level and scope of the safety evaluation to be conducted prior to leasing will be developed according to the level of contamination and hazards at the facility. For CERCLA sites, the safety evaluation begins with a qualitative comparison of the condition of the facility against agreed upon Applicable or Relevant and Appropriate Requirements (ARARs) and then moves towards a more detailed quantitative assessment. For non-CERCLA sites, if a current and applicable NEPA document is available, such information may be integrated with safety evaluation data. Regardless of the level of contamination at the facility, DOE is also responsible for considering physical hazards and other safety issues, consistent with commercial practices.

³"Resourceful Reuse: A Guide to Planning Future Uses of Department of Energy Sites," DOE/EM-0284, May 1996.

Much of the information for characterizing uncontaminated facilities is typically contained in an American Society of Testing & Materials (ASTM) Phase I Environmental Assessment or other process that fulfills the requirements for identifying such parcels as contained in CERCLA 120(h). Additional characterization data and sampling may be necessary to sufficiently address possible release or exposure scenarios that may be unique to the proposed leasing activity.

It is the responsibility of the DOE Field Organization to provide EPA, appropriate state agencies, and EH, with all relevant documentation including potential hazards and proposed controls when leasing under section 161 (g) of the AEA. The DOE Field Organization will provide a data package that will:

1. document the nature, magnitude, and extent of any environmental contamination of property considered for lease;
2. define environmental contamination responsibilities associated with the lease; and
3. develop sufficient information to assess the risks to worker safety and the protection of public health and the environment that may be caused by the projected use of the leased premises.

The DOE Field Organization will seek advice from the appropriate state or EPA regional office and EH on the contents of the data package. EH, EPA, and the state may provide supplemental consultation to the DOE Field Organization by conducting safety reviews of the property. The DOE Field Organization, in consultation with the Lead Program Secretarial Officer, will make final determination on the suitability of leasing the property.

C. Evaluation Criteria

The Field Organization's determination that an adequate level of protection is afforded workers at leased facilities will be based upon an analysis of evaluation criteria that will be based on, but not necessarily limited to, those aspects listed below. The Departmental Field Organization will coordinate with the LPSO to establish the evaluation criteria. The Departmental Field Organization will coordinate with other Program Secretarial Officers (PSO) when the PSO retains line accountability for safety and security for the PSO- specific facilities at a site.

1. Environmental Compliance: Identify and comply with all necessary new permits or modifications to existing permits and meet

regulatory requirements of local, state, and federal laws.

2. Facility Condition: The baseline physical condition of the facility will be inventoried and evaluated prior to any leasing action, including personal and related real property, zoning and code compliance, structural integrity, and electrical and mechanical systems.
3. Regulatory Oversight for Lessee/Tenant : Identify the Department's regulatory responsibilities with respect to workers and activities at the leased facility. Ensure that appropriate local, state, and federal regulators are notified of their regulatory responsibilities for the leased facility.
4. DOE Operational Safety and Health Considerations: Facilitate an orderly transfer of safety and health jurisdiction to appropriate local, state, and federal regulators such as the Occupational Safety and Health Administration (OSHA) and the Nuclear Regulatory Commission. (OSHA has indicated it will not take responsibility for restricted release facilities.) Considerations will include the location of the facility, potential impacts of other site facilities, and emergency preparedness measures.
5. Security Considerations: Ensure that the appropriate security requirements for the site are maintained and are consistent with the future use of the leased facility.
6. Types of DOE and other leased facilities in proximity to leased property: Determine the type of work being performed or to be performed in DOE facilities near leased property. The purpose of this evaluation is to assess the types of hazards associated with these facilities to which the lessee employees could potentially be exposed and to evaluate existing authorization bases and SARs.
7. Type of work to be performed at the leased facility: Determine the types of hazards associated with the work to be performed by the lessee. It is anticipated that the terms of the lease will identify allowable uses for leased facilities.

D. Protectiveness Decision

The Field Organization will review the proposed leasing action's conformance with the evaluation criteria (see Section C) and make a

protectiveness decision. The Field Manager's protectiveness decision will provide the basis for determining which graded category will be applied to the facility (see Section E).

E. Graded Protection Categories

Facilities and/or sites that have been determined suitable for leasing as a result of the safety evaluation and protectiveness decision are categorized in the following three grades:

1. Unrestricted Release (workers classified as members of the public): This category includes property that is suitable for release for unrestricted use under DOE 5400.5 and is outside of the controlled area. The future use of the property does not affect the safety basis of any DOE facility on the site or affect Departmental activities with respect to worker safety and health. DOE activities at non-leased facilities are not expected to provide occupational exposure to lessees. Lessee activities do not involve radiological work for DOE. Doses received by lessee employees from all DOE sources onsite should be maintained ALARA. Worker protection provisions under 10 CFR 835 do not apply to lessees, and lessees are treated as if they were members of the public.
2. Restricted Release (workers classified as members of the public): This category includes property that is suitable for release with restrictions under DOE 5400.5. It may be either inside or outside of the controlled area. The future use of the property does not affect the safety basis of any DOE facility on the site or affect Departmental activities with respect to worker safety and health, and the workers at the leased facility are treated as members of the public. Lessee activities do not involve radiological work for DOE. Doses received by lessee employees from all DOE sources onsite should be maintained ALARA. Lease terms will ensure that lessees are provided the same worker protections as members of the public under 10 CFR 835. 10 CFR Part 835 will apply to the effects on workers at leased facilities from DOE activities at non-leased facilities.
3. Restricted Release (workers classified as if they were general employees): This category includes property that is suitable for release with restrictions under DOE 5400.5. It may be either inside or outside of the controlled area. The future use of the property may affect 1) the safety basis of one or more DOE facilities on the site or 2) affect Departmental activities with respect to worker

safety and health. Where lessee activities do not involve radiological work, doses received by lessee employees from all DOE sources onsite should be maintained ALARA. Lease terms will provide that the workers at the leased facility are treated as general employees and will be protected via access controls, emergency response training, and other methods determined appropriate by the Field Organizations in order to provide adequate safety and health protection. Lessee activities may involve radiological work for DOE. 10 CFR Part 835 will apply to the effects on workers at leased facilities from DOE activities at non-leased facilities. Activities for DOE will be subject to 10 CFR Part 835 and workers involved in these activities will be classified as general employees.

F. Oversight Responsibilities

Based on an analysis of oversight responsibilities associated with the three-graded protection categories, it has been determined that there are no gaps in oversight responsibilities. The table below illustrates the results of this analysis. Note: To ensure that there are no gaps in oversight responsibilities, lessees may not begin any non-DOE activity until DOE has transferred its safety and health oversight responsibility to the appropriate external regulator (i.e., NRC, OSHA, Agreement State).

Graded Protection Category	Environmental Protection	Occupational Radiation Protection	Industrial Protection
Unrestricted Release (workers classified as members of public)	EPA, State	NRC, Agreement State	OSHA
Restricted Release (workers classified as members of the public)	DOE, and EPA or State	DOE, NRC, Agreement State	DOE

Restricted Release (workers classified as if general employees)	DOE, and EPA or State	DOE, NRC, Agreement State	DOE
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Table 1. Oversight responsibilities of property determined to be suitable for leasing.

G. **Price-Anderson Application**

In recent years, there has been an increase in the use of arrangements other than procurement contracts to achieve DOE's objectives. For example, DOE has engaged in efforts to reindustrialize and re-use assets (e.g., facilities, equipment, materials, utilities, and trained work forces) through the leasing of facilities no longer used for DOE activities to groups that will use them for research and development, and industrial and commercial purposes. The primary purpose of these reindustrialization efforts is to encourage the development of non-DOE activities. In many instances, however, these efforts also result in a direct benefit to DOE such as when a lessee or sub-lessees agree to perform clean-up services for DOE in exchange for a reduced lease rate. DOE considers these arrangements to be contracts covered by the indemnity to the extent they result in the direct provision of goods or services for the account of DOE. The fact the work is not being performed pursuant to a traditional procurement contract does not change the fact that the work to be performed is for the account of DOE and that DOE receives a direct benefit.

The DOE indemnification does not cover commercial activities that are not for the account of DOE, even if such activities take place on DOE property under a lease or other arrangement with DOE. Commercial activity on DOE property, however, may take place in proximity to nuclear material that is a legacy from prior activity conducted for DOE. If a nuclear incident results from such legacy material, then the commercial activity would be included within the omnibus coverage of the DOE indemnification that related to the contractual activity that resulted in the legacy material. In cases of commercial activity in proximity to legacy material, DOE believes there would be a general presumption that any nuclear incident resulted from the legacy material.

H. **Exemptions**

Exemptions to this policy will be determined by the LPSO, in consultation

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with the Office of Environment Safety and Health, the EPA, and Agreement States, where applicable, that is responsible for the institutional health and long-term planning at assigned sites, landlord activities, and accountability for overall site integration and operations. Exemptions that are related to requirements under 10 CFR 835 and 10 CFR 830 will be determined by the LPSO with the concurrence of the Office of Environment Safety and Health.